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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 EAGLE HARBOR HOLDINGS, LLC,
9 and MEDIUSTECH, LLC,

10 Plaintiffs,

11 v.

12 FORD MOTOR COMPANY,

13 Defendant.

CASE NO. C11-5503 BHS

ORDER DENYING
DEFENDANT'S MOTION TO
COMPEL

14 This matter comes before the Court on the parties' expedited discovery motion
15 (Dkt. 257). The Court has considered the pleading and the remainder of the file and
16 hereby denies the motion for the reasons stated herein.

17 **I. FACTUAL BACKGROUND**

18 On November 29, 2013, Plaintiffs Eagle Harbor Holdings, LLC, and Mediustech,
19 LLC, served Defendant Ford Motor Company ("Ford") a supplemental privilege log.
20 Dkt. 257 at 3. After Ford objected to the withholding of numerous documents, Plaintiffs

1 agreed to produce some documents. *Id.* at 4. This motion followed, and Ford contends
2 that there are nearly 300 communications at issue. *Id.* at 24.

3 II. DISCUSSION

4 As a threshold matter, the parties' categorical approach to the 300 documents at
5 issue makes it nearly impossible for the Court to rule as to every document in question.
6 Therefore, the Court will address Plaintiffs' categories in an effort to narrow the dispute
7 so that the parties may resolve the remaining dispute among themselves or file a motion
8 regarding a manageable number of specific documents.

9 As the parties withholding production of documents based on the assertion of
10 attorney-client and work product privileges, Plaintiffs bear the burden of establishing that
11 the privilege applies. *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009)
12 (attorney-client privilege); *see Verizon California Inc. v. Ronald A. Katz Tech. Licensing,*
13 *L.P.*, 266 F. Supp. 2d 1144, 1147 (C.D. Cal. 2003) (work product).

14 With regard to the communications between Plaintiffs' counsel and a public
15 relations firm, the Court adopts the reasoning and five-factor test set forth in *In re Grand*
16 *Jury Subpoenas*, 265 F. Supp. 2d 321, 327–330 (S.D.N.Y. 2003). Under that test,
17 privileged communications between Plaintiffs' attorneys and Gogerty Marriott are
18 protected. Therefore, the Court denies Ford's motion as to such documents.

19 With respect to Plaintiffs' employees or their functional equivalent, Plaintiffs
20 assert that the underlying documents were privileged and disclosure to these employees
21 or contractors did not waive privilege. Dkt. 257 at 15–16. The Court agrees with
22 Plaintiffs to the extent that any communication *was* otherwise privileged and the

1 employee or contractor signed an agreement not to disclose privileged or confidential
2 information. Therefore, the Court denies Ford's motion as to any document that meets
3 these two conditions.

4 With regard to the common interest issue, the privilege applies where: (1) the
5 communication was made by separate parties in the course of a matter of common
6 interest; (2) the communication was designed to further that effort; and (3) the privilege
7 has not been waived. *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120,
8 126 (3d Cir. 1986). The Court agrees with Plaintiffs that otherwise privileged
9 communications with investors or potential investors will not waive the privileged nature
10 of that communication. Therefore, the Court denies Ford's motion as to any document
11 that meets these criteria.

12 On the other hand, Ford argues that "Plaintiffs contend that communications with
13 virtually every contractor Plaintiffs retained and every investor that Plaintiffs solicited are
14 protected by privilege." Dkt. 260 at 24. To the extent that Plaintiffs are attempting to
15 use the common interest privilege as a separate privilege in and of itself, they may not do
16 so. However, based solely on review of the privilege log, the Court is unable to
17 determine whether any assertion is improper. If, subsequent to this order, Ford has a
18 good faith basis to believe that Plaintiffs are improperly extending the common interest
19 privilege to specific documents, there are procedures for challenging such assertions of
20 privilege on a specific document-by-document basis.

III. ORDER

Therefore, it is hereby **ORDERED** that Ford's motion to compel is **DENIED** as stated herein.

Dated this 28th day of April, 2014.


BENJAMIN H. SETTLE
United States District Judge